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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, )  
8 )  
Plaintiff, )  
9 ) CR-16-43-GF-BMM  
versus )  
10 )  
DEBORAH JOY DURAND, )  
11 )  
Defendant. )

## **TRANSCRIPT OF PROCEEDINGS**

## **MOTION HEARING**

BEFORE THE HONORABLE JOHN T. JOHNSTON  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
FOR THE DISTRICT OF MONTANA

Chief Mountain Courtroom  
Missouri River Federal Courthouse  
United States District Court Great Falls  
125 Central Avenue West  
Great Falls, MT 59404

August 9, 2017  
2:00 p.m.

Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

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PROCEEDINGS

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(Open court)

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(Defendant present)

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(Proceedings began at 2:01 p.m.)

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THE BAILIFF: All rise. The United States District Court is now in session.

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THE COURT: Well, good afternoon, and please be seated.

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MR. WELDON: Good afternoon, Your Honor.

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CLERK OF COURT: This Court will now conduct a motion hearing in Criminal 16-43, Great Falls, Judge Morris and Judge Johnston, United States of America versus Deborah Joy Durand.

THE COURT: And, Ms. Hunt, how are you today?

MS. HUNT: I'm doing well, Your Honor.

THE COURT: And who is seated with you at counsel table?

MS. HUNT: Ms. Durand is here today.

THE COURT: All right. Welcome to my courtroom, Ms. Durand.

THE DEFENDANT: Thank you, sir.

THE COURT: And, so, we have a consolidated hearing, basically, on a couple of motions pending before the Court.

1 One is a motion to dismiss for entrapment.

2 MS. HUNT: (Nods head affirmatively)

3 THE COURT: And the second is a motion in limine in  
4 relation to this video and interview that was conducted.

5 Is that correct? Am I --

6 MR. WELDON: (Nods head affirmatively)

7 THE COURT: -- on track?

8 MR. WELDON: I agree, Your Honor.

9 THE COURT: All right.

10 MS. HUNT: Yes.

11 THE COURT: So, Ms. Hunt, they are your motions, are  
12 you ready to proceed?

13 MS. HUNT: I am, Your Honor.

14 THE COURT: Okay. Please do.

15 MS. HUNT: Thank you.

16 So, good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MS. HUNT: I'm glad to be here today to speak to you  
19 about the motions that we filed. We understand that rulings  
20 on a motion to dismiss aren't typical, because, in a large  
21 majority of the cases, there would be a factual dispute. But  
22 the facts in Ms. Durand's case, uhm, are not in dispute.

23 The government, of course, has filed its response, and  
24 put in its response quite a few facts, but the facts that I  
25 want this Court to focus on today are very simple. Ms. Durand

1 was employed by the post office. She suffered work-related  
2 injuries as a result of her employment there. She then went  
3 through the process to obtain Workers' Comp benefits, having  
4 done what was asked of her in the evaluations and medical  
5 appointments. She then got Workers' Comp benefits, and  
6 continues, still, to receive those benefits.

7 Those facts are what drive the motions in this case. And  
8 discussion today might overlap with regard to the motion to  
9 dismiss and the motion in limine, but, again, that's the  
10 central focus of what is going on here.

11 Ms. Durand, when she was in the process of obtaining  
12 these benefits, saw Doctor Hood at some point, and I think --  
13 I believe that was in 2008. He evaluated her, ran tests,  
14 talked with her, and determined that she was totally disabled,  
15 that she could not return to her work and be gainfully  
16 employed in that capacity.

17 THE COURT: Her doctor determined that. Is that  
18 right?

19 MS. HUNT: Doctor Hood, yes. One (indicating).

20 THE COURT: "A," one of her doctors.

21 MS. HUNT: One of her doctors, yes. But one that  
22 actually she saw, uhm, as a result of another investigation  
23 that was in place.

24 So, she is rendered totally disabled, and she relies on  
25 that. She does not return to work. And this continues for

1 years, until there is this kayak trip set up by the government  
2 to induce her to go recreate.

3 Having done so, they videotaped this, and then used that  
4 as evidence that she somehow, years beyond -- or years prior,  
5 I should say, was fraudulent, that she misled the doctor in  
6 his assessment of her being totally disabled.

7 And that is the gist of the government's case, and that  
8 is the gist of why this entrapment and estoppel argument  
9 exists. She was given advice, that is that she cannot return  
10 to work, that she is totally disabled.

11 THE COURT: Well, did the government advise her that  
12 she couldn't go to work?

13 MS. HUNT: It wasn't --

14 THE COURT: I thought her doctor did.

15 MS. HUNT: It was a Workers' Comp doctor, that is  
16 followed through with a Workers' Comp claim, which is a  
17 government employee -- a government agency.

18 THE COURT: Well, sure. But the doctor -- this is  
19 my understanding of Workers' Comp. So, someone gets hurt at  
20 work, they go to their own doctor, and then they might have to  
21 go to a doctor for the insurance company or the government.

22 MS. HUNT: Uh-huh.

23 THE COURT: The government can say, well, we want  
24 our doctor to look at you, too. Right?

25 MS. HUNT: Right.

1 THE COURT: Is that what happened here? Is that who  
2 this doctor is?

3 MS. HUNT: Doctor Hood, I believe, is somebody,  
4 again, who they had evaluate for -- for the Workers' Comp  
5 purposes. I don't believe that it was somebody that she  
6 sought out alone.

7 THE COURT: Okay. So, Doctor Hood. Let's pretend  
8 -- well, I'll -- I'll call him an independent medical  
9 examiner.

10 MS. HUNT: Uh-huh.

11 THE COURT: Okay?

12 MS. HUNT: Uh-huh.

13 THE COURT: Because he's not her treating physician,  
14 so I'll call him an IME doctor. Okay? Have you ever heard of  
15 those?

16 MS. HUNT: Right. Yes.

17 THE COURT: Okay.

18 MS. HUNT: Yes, Your Honor.

19 THE COURT: That's what I'll call him. I don't know  
20 if that's what he is or not.

21 MS. HUNT: Okay.

22 THE COURT: So, a person seeking work comp benefits  
23 goes to their own doctor, and then they are requested by the  
24 insurer or the government to go to an IME doctor. And, then,  
25 she goes to the IME doctor -- let's leave you out of it for

1 now. A hypothetical person goes to the IME doctor and says,  
2 well -- the doctor says, "Well, how you doing?" And the  
3 patient says, "Well, not very good. I can't lift my legs and  
4 I can't walk, and my job requires walking." And the doctor  
5 says, "Oh, okay. So, does this hurt to move your legs?"  
6 "Yeah." "Well, that hurts. And does this hurt?" "Yeah, that  
7 hurts." "And can you stand? How long can you stand?" "Well,  
8 no more than five minutes."

9 So, doctors are like -- lots of them are like this,  
10 "Well, the claimant says that her legs won't work, and it  
11 hurts when she moves her legs, her job requires her to walk,  
12 she is totally disabled, as far as I'm concerned," and sends  
13 that in. Right?

14 MS. HUNT: Correct.

15 THE COURT: Okay. And, then, you know, they  
16 continue to treat, see the doctor from time to time, their own  
17 doctor.

18 MS. HUNT: Right.

19 THE COURT: That's, I'm sure, what happened here.  
20 And then just, coincidentally, they run in the Governor's Cup  
21 and get third in the marathon. Right? Just say that that  
22 happened.

23 MS. HUNT: (Nods head affirmatively) (Shrugs  
24 shoulders) Yes, that could happen.

25 THE COURT: And that there was a taping of the

1 marathon, and then somebody from the Workers' Compensation  
2 company says, "Geez, I think that woman is on Workers'  
3 Compensation benefits for being totally disabled because she  
4 can't move her legs, and she just got third place in the  
5 marathon."

6 Whereas -- that this is sort of like that. I mean, the  
7 government didn't tell her to do anything in the beginning. I  
8 mean, the crime is telling the doctor that she has got these  
9 problems, when she doesn't have them.

10 MS. HUNT: But the evidence --

11 THE COURT: Isn't that right?

12 MS. HUNT: -- the evidence that the government  
13 suggests that she was fraudulent is because of the trip that  
14 they set up --

15 THE COURT: Oh, sure. But that's not the crime.  
16 The crime isn't going on a kayaking trip. If there is a crime  
17 at all. It's not going on the kayaking trip, it's telling  
18 somebody that I can't move my arms and I can't lift this and I  
19 can't do that, when, in fact, you can.

20 MS. HUNT: But, again, the government's evidence --  
21 the sole evidence in this case is that trip, an isolated event  
22 where she is -- we don't know how much medication she had  
23 taken to be able to do some of the things, if she was able to  
24 do some of the things on that trip. An isolated event. Set  
25 up by the government. To try to prove that, years prior, she

1 somehow did -- she told a falsehood to the doctor.

2 THE COURT: Well, it's a persistent thing, when you  
3 are on Workers' Compensation, that if you are no longer  
4 disabled you've got to tell your employer that you aren't,  
5 right?

6 MS. HUNT: In general.

7 THE COURT: That makes sense, right?

8 MS. HUNT: In general, yes. As far as Workers' Comp  
9 goes, yes.

10 THE COURT: That makes sense. Right. And, so, how  
11 long was this kayaking trip? Like, four or five days?

12 MS. HUNT: A few days, yes.

13 THE COURT: All right. And, so, what happens is the  
14 government is suspicious of your client so they set up the  
15 trip. They say, "Hey, Ms. Defendant, you won a trip." And  
16 then they film the trip, and it's contrary to the statements  
17 that she's made to the doctor, right?

18 MS. HUNT: I think it goes beyond just setting up a  
19 trip and filming the trip. They encourage her to go on a  
20 trip, and encourage her to do things, that, again, uhm, maybe  
21 she is assessing that risk on her own, based on her injuries,  
22 we don't know that, and is just deciding, well, I'm still  
23 injured, this still hurts, but I'm still going to do this  
24 because I won this trip.

25 THE COURT: Right.

1 MS. HUNT: Again, no evidence of her having  
2 committed a falsehood years prior.

3 THE COURT: Right. But you're talking about  
4 dismissing the case on entrapment. And, I mean, everything  
5 you are saying -- like, is this a judge trial?

6 MR. WELDON: It is, Your Honor.

7 MS. HUNT: It is, Your Honor.

8 THE COURT: Yeah? Okay. So, everything you are  
9 saying Judge Morris can listen to and say, "Yeah, maybe she  
10 was on a lot of medication at the time that she was on the  
11 kayak trip, and maybe" -- whatever, whatever the things are  
12 that you were just saying right now. He will listen to all of  
13 that, and he will judge the evidence, then Mr. Weldon has to  
14 prove beyond a reasonable doubt that, in fact, you know, if  
15 she says X to work comp, but she can do everything.

16 She can certainly work if she can go on the kayaking  
17 trip. I don't think it's that complicated, right?

18 MS. HUNT: Well, I think, as far as whether this is  
19 proper to dismiss at this juncture, we still have the  
20 government stating to her that she is totally disabled, and  
21 that just -- that statement by Doctor Hood in 2008, that she  
22 cannot return to work, is not a statement that she can't  
23 assess some day to recreate. And that is an affirmative  
24 misleading on their part to then suggest to her that she  
25 should go on this trip and do these actions, and then they

1 will use that as evidence that she was fraudulent. That's the  
2 affirmative misleading portion and the entrapment portion

3 THE COURT: Well, the government is telling -- well,  
4 I don't know if the government -- Doctor Hood might not be the  
5 government, I don't know. Is Doctor Hood the government?  
6 Does Doctor Hood work for the government, do you know?

7 MS. HUNT: I don't know that he works for the  
8 government.

9 THE COURT: Okay. So, that's a problem, if he  
10 doesn't, right?

11 MS. HUNT: Well, if he works for Workers' Comp, and  
12 she is referred to by Workers' Comp and seeks that, you'll see  
13 that agency as connected with the government.

14 THE COURT: All right. So, let's try this a  
15 different way. I'll be the government, you be the work comp  
16 -- the person who wants Workers' Compensation, I'll be the  
17 government. And I say to you, "Well, Joslyn Hunt, can you  
18 walk?" And I want you to say "No" to me.

19 MS. HUNT: No.

20 THE COURT: Okay. "Then you're totally disabled,"  
21 Right? "Because you have told me that you can't walk, I am  
22 telling you that you are totally disabled," right?

23 MS. HUNT: In this very simplistic --

24 THE COURT: Yes.

25 MS. HUNT: -- scenario?

1 THE COURT: Yes.

2 MS. HUNT: Yes.

3 THE COURT: And, so, then, when you turn around and  
4 go to sit down, I'm going to say, "Well, you can walk."

5 MS. HUNT: But that also discounts that that's not  
6 what occurred in this case when she saw Doctor Hood. That he  
7 ran his own tests and made his own assessment, beyond what was  
8 stated by her.

9 THE COURT: Uh-huh. And what does Doctor Hood have  
10 to say about this kayaking trip?

11 MS. HUNT: Doctor Hood, years later, after seeing  
12 the kayaking trip, suggests that he was wrong in his  
13 assessment.

14 THE COURT: Right.

15 MS. HUNT: Which is convenient. Because whatever  
16 fault he may have is -- lies with -- I mean, is placed just on  
17 Ms. Durand. That he doesn't have any independent obligation,  
18 as a medical doctor, to make his assessment, which he did.

19 THE COURT: When you talk about estoppel, I mean,  
20 that's sort of what's running through the case against your  
21 client. I think that's the government's point of view, is  
22 you're estopped from claiming that you're criminally liable  
23 because you're claiming that you can't do some thing, when, in  
24 fact, you can. I think that's how they are seeing it. That  
25 you can do a lot more than you told Doctor Hood that you could

1 do; and if you would have told him the truth, he never would  
2 have said that you were disabled in the beginning.

3 Isn't that what their case is?

4 MS. HUNT: That's what they are suggesting.

5 THE COURT: Well, they are more than suggesting it.  
6 That's what the Indictment says. Basically, that. Right?

7 MS. HUNT: Yes.

8 THE COURT: Okay. So, but you are saying that she  
9 was entrapped. Was she entrapped by Doctor Hood saying that,  
10 "You're totally disabled"?

11 MS. HUNT: I think she relied upon him telling her  
12 that she cannot return to work and be gainfully employed in  
13 that capacity --

14 THE COURT: She was asserting that, though. She was  
15 the one saying that "I can't go back to work," right?

16 MS. HUNT: But he still -- she followed through with  
17 the process that exists for obtaining Workers' Comp benefits.  
18 And that was part of the assessment, was to run tests; do her  
19 evaluation, which included, of course, a discussion with her,  
20 uhm, and he made his determination. And that determination  
21 was that she is totally disabled.

22 So, she should be able to rely on that. Which she did,  
23 obviously, for years, until they, then, set up this ruse kayak  
24 trip.

25 THE COURT: Right. The kayak trip was a ruse. But

1 what your client was doing on the kayak trip isn't a ruse,  
2 that's just reality, right?

3 MS. HUNT: As far as -- again, that's an isolated  
4 incident, showing that she may have, uhm -- who knows, again,  
5 how medicated she was, or what she was suggested to try. And,  
6 again, a totally disabled assessment, but not being gainfully  
7 employed with the U.S. Postal Service does not negate  
8 recreation in its entirety.

9 I don't believe that her recreating once, even on this  
10 ruse trip, would suggest that she was fraudulent years  
11 prior.

12 THE COURT: Okay. But isn't -- aren't these all  
13 just arguments about how to weigh the evidence to Judge  
14 Morris? Because the latter part of what you sort of leap off  
15 into, well, this was over a short duration and we don't know  
16 how much medicine she was on, --

17 MS. HUNT: Uh-huh.

18 THE COURT: -- and we don't know how much pain she  
19 was in at nighttime when nobody can see her, that's more like  
20 for Judge Morris to weigh in determining whether the  
21 government has met its burden of proof, right?

22 MS. HUNT: I see -- I appreciate what the Court is  
23 saying, but I still --

24 THE COURT: You can disagree with me. I don't get  
25 mad if you disagree with me.

1 MS. HUNT: I do disagree with that assessment, only  
2 from the standpoint that it's still, I believe, an affirmative  
3 misleading by the government.

4 THE COURT: But what's misleading? The --

5 MS. HUNT: The fact that she was told that she is  
6 totally disabled, she -- and she relied on that, obtained  
7 benefits, still obtains benefits in this regard, followed  
8 through with everything she was told, and, yet, now she is  
9 being indicted for fraud.

10 THE COURT: Right.

11 MS. HUNT: Based on a trip that they set up.

12 THE COURT: Right. I think what the government's  
13 position is, is we are charging you with fraud because you  
14 were able to engage in these activities that you are saying  
15 that you can't engage in to the doctor.

16 MS. HUNT: I guess, and that would lead me into, if  
17 we want to go into the motion in limine, because it gets into  
18 -- it spills into the isolated -- the actual kayak trip and  
19 the videotaping of that trip.

20 Again, it is an isolated trip, it's an isolated video of  
21 that trip. To suggest to -- to have that video, along with a  
22 picture-in-picture video of an interview that she did later  
23 after that trip -- I think beyond it not being direct proof of  
24 fraud, as we've discussed today, as I've argued because,  
25 again, one trip (indicating) years later does not equate to,

1 years prior, a fraud, that she didn't tell the doctor properly  
2 how much pain she was in, but, beyond that, I think it's  
3 unduly prejudicial to have the jury -- or the judge, I guess,  
4 now, in our case, review a picture-in-picture video, which is  
5 pretty much what the government's argument is, that she went  
6 on the kayak trip and she says that she is injured.

7 I think that that picture-in-picture video shouldn't be  
8 admitted. It should be separated, at a minimum. But we would  
9 argue that it should be excluded, because we do not believe  
10 that it's relevant to this case because it's an isolated  
11 incident. But, beyond that, it is unduly prejudicial.

12 THE COURT: Okay. So, Rule 403 says that it has to  
13 be unfairly prejudicial, and it has to substantially outweigh  
14 its probative value.

15 MS. HUNT: Right.

16 THE COURT: Okay. So, if somebody is looking at it,  
17 it's -- you can look at it and say, "Well, here's the little  
18 picture, and then here's the activities." Right?

19 MS. HUNT: Right.

20 THE COURT: And, so, I think the way it works is,  
21 "Well, are you able to lift anything?" "No, I'm not able to  
22 lift anything," and then -- then there is video of her lifting  
23 the kayak and carrying it down to the river, or something.  
24 Right?

25 MS. HUNT: Correct.

1 THE COURT: And then there is, "Well, can you use  
2 your arms?" "No, I can't use my arms, they are in too much  
3 pain," and then there is pictures of her kayaking down the  
4 river, or something. Right?

5 MS. HUNT: Correct.

6 THE COURT: Okay. So, it's highly prejudicial.

7 MS. HUNT: Yes.

8 THE COURT: Right? That's, like, all evidence  
9 against your case is always -- the other party always puts on  
10 the most prejudicial evidence that they can get their hands  
11 on, right?

12 MS. HUNT: That is correct.

13 THE COURT: Okay. So, why is it unfair?

14 MS. HUNT: It's unfair because they can still  
15 present their case without the picture-in-picture video. They  
16 could display the kayak trip, they could display the interview  
17 later. They don't need to have the video make their argument,  
18 and have the video play a concocted video of a  
19 picture-in-picture of what is -- the trip is and what she is  
20 saying. That's one piece of it.

21 But, beyond that, because it is a kayak trip, an isolated  
22 incident, as we've talked about. And that we don't know,  
23 again, how medicated she was, and even what medical testimony  
24 might be needed to assess whether she even had that ability.  
25 If she was still injured, what the kayak trip did to her to

1 further injure her, or that kind of assessment of the kayak  
2 trip, that kind of testimony is needed from a medical doctor.

3 Again, it goes -- it links back into what I've said at  
4 the beginning, because we are talking about an isolated  
5 incident, it's not proof that she was lying years prior.

6 THE COURT: Is it a crime to continue to take  
7 benefits if you recover? So, like, on a certain date, like,  
8 five years ago, "I can't use my legs."

9 MS. HUNT: Uh-huh.

10 THE COURT: Okay? And then over the next four  
11 years, five years I get better and I am able to use my legs,  
12 and I can walk, and I have a treadmill in the basement, and I  
13 can run, and isn't it a crime, then, to continue to perpetuate  
14 that you are totally disabled if you no longer are?

15 MS. HUNT: But I think she has followed, again,  
16 through with the process as it exists to assess that  
17 determination.

18 THE COURT: Okay.

19 MS. HUNT: She has done all that was asked of her.

20 THE COURT: So, in relation to the  
21 picture-in-a-picture video, that's an efficient way for the  
22 government to present its case, and you don't think that they  
23 should efficiently present it because it's prejudicial.

24 MS. HUNT: I don't think it's an efficient way. I  
25 think they can do it in a different manner. And, again, I

1 think that they need to -- at a minimum, there needs to be  
2 some medical testimony that coincides with the video.

3 THE COURT: Well, I think what their point is, is  
4 it's not really medical testimony, it's that her statements  
5 don't match her activities.

6 MS. HUNT: And they can present that separately from  
7 the picture-in-picture video.

8 THE COURT: The Rules of Evidence don't require --  
9 they don't say, well, the judge says the way you have to  
10 present it. As long as they present it in a way that's  
11 admissible, it's admissible, right?

12 MS. HUNT: If it's admissible. But if it's -- what  
13 we are saying is that it is unduly prejudicial in her case.

14 THE COURT: Okay. Well, thank you very much.

15 MS. HUNT: Thank you.

16 THE COURT: I appreciate your arguments.

17 And, Mr. Weldon, what do you have for the government  
18 today?

19 MR. WELDON: Very briefly, Your Honor.

20 I did want to start a little bit with the facts. I know  
21 that it's a motion to dismiss, and that was the first issue,  
22 but I think it's important to, at least, discuss that.

23 The statement was that she was told she was disabled, and  
24 I always fall back to the question of why? Why was she told  
25 that she was disabled? And it's because she lied to the

1 doctors. And that's the key in Workers' Comp. If you  
2 convince a doctor to say that you're totally disabled, then  
3 you can perpetuate that fraud throughout the system.

4 And Doctor Hood was the individual who was brought up in  
5 this particular proceeding, and he will be here to testify.  
6 And we filed an expert witness disclosure for him, it's  
7 Document 69 in the Court's file.

8 I think that some of the information that he provides is  
9 particularly relevant, where he says initially that she is  
10 totally disabled. And then he was actually shown the  
11 additional evidence, and on Page 3 of that expert witness  
12 disclosure he states that the first video -- because there  
13 were actually two videos in this case, one was in 2008, where  
14 there was video of her lifting hay, feeding horses, and her  
15 neighbors will be here to testify about all of the activities  
16 that she was doing when she was working on a five-acre plot of  
17 land, but then Doctor Hood was able to see that, as well as  
18 the kayaking video.

19 And he states that, "The video even showed Doctor Hood  
20 that Durand could bend fully at 90 degrees, she walked without  
21 a limp, and she carried heavy objects without indicating any  
22 evidence of discomfort. The second video showed Doctor Hood  
23 that Durand was kayaking, and she was fully engaged and active  
24 throughout the video. Doctor Hood also made -- was also made  
25 aware that Durand was riding horses, which also supports the

1 conclusion that she could do almost any type of activity.

2 After reviewing this evidence, Doctor Hood concluded that  
3 Durand was disingenuous and misled him during the physical  
4 exam."

5 So, that's really the basis. So, when we talk about  
6 Doctor Hood, he says, "Absolutely, I provided the opinion that  
7 she was totally disabled, I provided that opinion because she  
8 lied to me." And that's the basis for the fraud allegations  
9 for Ms. Durand.

10 Then I did want to talk just about the elements, because  
11 I think that's important, for the motion to dismiss. We have  
12 the element that I outlined on Page 11 of the brief, and it  
13 states that, "The defendant was given advice by an authorized  
14 federal government official empowered to render the claimed  
15 erroneous advice." We can just assume for a minute that  
16 Doctor Hood and Doctor Strausser were government officials. I  
17 think there certainly is an argument that they are not, but I  
18 think that the piercing part is Number 2 where it states that,  
19 "The authorized federal government official was made aware of  
20 all of the relevant historical facts."

21 If Ms. Durand can do all of these things, and she is  
22 claiming that she can't, then, of course, these individuals,  
23 even assuming that they are government officials, are not made  
24 aware of the historical facts. And, so, that's why I think  
25 that it doesn't go and fit within the estoppel argument. And,

1 of course, it can't be for the substantive, because they have  
2 to show that the person doesn't have a propensity to commit  
3 the fraud, and they can't do that in this case.

4 When we talk about the kayaking video, the kayaking video  
5 is a really interesting piece of evidence, because it has the  
6 picture-in-picture, where we have a direct claim, and then a  
7 direct contrast. And it is exactly proving what Doctor Hood  
8 and Doctor Strausser experienced when they were working with  
9 Ms. Durand.

10 So, the government, in our Indictment, we've alleged a  
11 large period, I believe it begins in 2006, and then runs all  
12 the way until 2015. That kayaking video is during that time  
13 period. And I think you asked the question that gets right to  
14 the issue, if an individual can work during that kayaking  
15 trip, then they are committing fraud on that kayaking trip  
16 when they are also collecting Workers' Comp. That is direct  
17 evidence of fraud.

18 I agree with the Court one hundred percent, it is highly  
19 prejudicial. It is also critically probative. Because it  
20 shows the actual statements that Ms. Durand makes. And you  
21 can see that even in the video.

22 I think one of the best statements in that entire video  
23 is the claim that the kayaking trip was really for handicapped  
24 people, and that that's what they were trying to see, if they  
25 could help handicapped people.

1           And then you look at the disclosures, like in the  
2 authorized portions that she has to sign, and it basically  
3 says that you have to be very physically fit to engage in this  
4 sort of activity, that you are assuming all risks as a result  
5 of you kayaking in the ocean. Ms. Durand signed that with no  
6 problems, whatsoever.

7           And, then, after the fact, when she provided a review of  
8 the kayaking trip, she said that there was really no such pain  
9 at all. She mentioned that she had some pain in her elbow,  
10 but it turned out that it was just inflammation. So, when she  
11 is not talking to her doctors, people who allow her to  
12 basically take funds from the Workers' Comp fund, then she is  
13 more than willing to say that everything is okay.

14           And I will mention for the Court, also, the parting shot  
15 that Ms. Durand said when she was evaluating this particular  
16 trip is, "Please consider me for any and all other future  
17 trips" that can be recreational activities. So, I think that  
18 that goes right to the direct heart of the fraud.

19           I know there were some other claims about 404(b)  
20 evidence, we are not claiming this is other acts, we are  
21 claiming it is directly part of the --

22           THE COURT: It's not character evidence.

23           MR. WELDON: Correct.

24           THE COURT: It's evidence of actual fraud in this  
25 case.

1 MR. WELDON: Exactly right. And, then, the other  
2 thing that I want to finish, and then answer any other  
3 questions that the Court had, is this idea that the Code of  
4 Federal Regulations are cited. And I saw that a few times in  
5 the brief, and I think it's important for the Court to  
6 understand that there are really two processes at issue here.

7 We have a civil side, or an administrative side, where  
8 there is an administrative function where people are obtaining  
9 benefits. When they are doing that, there are always advisory  
10 components on these documents saying if you start committing  
11 fraud, you can be prosecuted criminally for that.

12 So, when we have the CFRs and the sections that people  
13 are operating within the administrative side, that is very  
14 different than the criminal side. And, so, I saw one of those  
15 citations. For example, going directly to a doctor, that has  
16 to do with the civil side.

17 Now, I understand that those principles apply; but when  
18 we get into Title 18, that's when we talk about wire fraud and  
19 false statements. (Nods head affirmatively)

20 THE COURT: All right. Well, thank you very much.

21 MR. WELDON: All right. Thank you, Your Honor.

22 THE COURT: And, Ms. Hunt, do you have some rebuttal  
23 to that?

24 MS. HUNT: I just have a few comments.

25 THE COURT: All right.

1 MS. HUNT: I will just follow up on what Mr. Weldon  
2 indicated with regard to the CFRs and the administrative side  
3 of things.

4 We did, of course, cite in our brief, and stand on what  
5 we cited, as far as it concerns other administrative problems  
6 in this case; but, beyond that, the case cite to the Ninth  
7 Circuit about not just having a video, and having somebody  
8 look at that video and make some sort of medical assessment by  
9 just that one video, that goes into our argument as to why  
10 this video, also, is unfairly prejudicial. Because without  
11 having that assessment, that medical testimony to coincide  
12 with that video, uhm, it should be excluded.

13 That's the Thomas v. Barnhart. And I understand that  
14 that is before an administrative law judge, but it states that  
15 they shouldn't accept the opinion of a physician that's just  
16 brief, conclusory, and unsupported by clinical judgment. By  
17 just looking at that video, that that's what they submitted to  
18 Doctor Hood, that's the situation we have here.

19 And, yes, there is a different administrative side, a  
20 criminal side, but that still plays into this case.

21 THE COURT: But, here, this Doctor Hood says, "After  
22 reviewing additional evidence," that's the video, "I have now  
23 concluded that Durand was disingenuous and misled me during  
24 the physical examination."

25 MS. HUNT: Uh-huh.

1 THE COURT: I mean, he's not just looking at one --  
2 just the video, he has a whole history with her before.

3 MS. HUNT: He has the review from before, his  
4 assessment from before, and now we are to believe that he was  
5 -- oh, I was wrong back then, but right now that she is a  
6 liar? (Shakes head negatively) That's what he is claiming.

7 THE COURT: I think that's exactly what he is  
8 claiming.

9 MS. HUNT: Uh-huh. Based on a video.

10 THE COURT: Right.

11 MS. HUNT: Which, again, we would claim is unfairly  
12 prejudicial and should not be submitted.

13 THE COURT: Okay. Well, I understand your  
14 arguments. And I appreciate the attorneys for both the  
15 government and Ms. Durand. I'll take it under advisement. I  
16 hope to have an order out soon. I mean, is the trial next  
17 Monday?

18 MR. WELDON: Not this Mon -- upcoming Monday, it's  
19 the following Monday, Your Honor.

20 THE COURT: It's the following Monday.

21 MR. WELDON: Correct.

22 THE COURT: So, I know that there is a right to  
23 appeal my findings and recommendation. Is it going to be  
24 inside the time frame by the time the trial starts? So, if  
25 you want to object to this, I suggest that you do it as soon

1 as possible, or at the final pretrial with Judge Morris.

2 MS. HUNT: Okay.

3 MR. WELDON: Certainly, Your Honor.

4 THE COURT: All right.

5 MS. HUNT: Thank you.

6 THE COURT: Well, thank you very much. Have a good  
7 day.

8 MS. HUNT: Thank you.

9 MR. WELDON: Thank you, Your Honor.

10 THE COURT: Court's in recess.

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12 **(Proceedings concluded at 2:31 p.m.)**

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## CERTIFICATE

I, Julie L. DeLong, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my knowledge, skill, and ability.

/s/ Julie L. DeLong 02/05/2018  
Julie L. DeLong Date